

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE UNITED STATES OF
AMERICA,

Appellant,

vs.

WILLIAM B. POLAND and
FREDERICK WILLIAM
LOW,

Appellees.

Brief of Appellees

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UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF ALASKA, DIVISION NO. 3.

This action is brought by the United States, praying for the vacation and cancellation of a patent granted to the defendant William B. Poland,

on the 22nd day of March, 1909, by which the said United States conveyed to William B. Poland the lands embraced in Survey No. 242, which are more particularly described in the patent itself set forth as Exhibit "B," in the Plaintiff's Complaint herein. Transcript p. 16. In said action it is further sought to have a certain deed, made by William B. Poland to the defendant Frederick William Low, vacated, cancelled and declared null and void, in so far as it affects the lands covered by said patent.

The gist of the action is that the defendant Poland had previously secured from the United States a patent for the premises included in Survey No. 241, more particularly described in said patent, which is Exhibit "A" attached to said complaint, page 13 Transcript, and which survey No. 241 is bounded on the north by Claim No. 242; and that the defendant Poland, by reason of the acquisition of the two adjoining claims secured from the United States more than one hundred and sixty acres of land entered in a single body in violation of Section 101, of the Compiled Laws of Alaska, being 32 Stat. L., p. 1028.

There is inserted in the Transcript a plat, showing the relative position of the two claims 241 and 242. (See p. 33.) Therefrom it will be seen that only one of said claims extends along the shore of any navigable water.

The Plaintiff alleges that the Defendant Poland

committed a fraud upon the United States, in illegally acquiring title to the lands embraced in Survey No. 242, in that he caused to be filed an affidavit in support of his application for a patent to the land embraced in said Survey No. 242, which said affidavit contained the following false statement:

“Said tract of land (referred to the land embraced in said Survey No. 242) does not exceed 160 acres in extent and is in frontage less than 160 rods along the shore of any navigable water, *and is more than eighty rods distant from any other survey or entry under the provisions of said Act of May 14, 1898*”;

and that the effect of said false affidavit was as set forth at the end of paragraph four of the Amended Complaint,

“That said statement was false and fraudulent in that it concealed from the officials of the Land Department of the United States the fact that land in excess of one hundred and sixty acres in a single body was entered by soldier’s additional homestead right under the application of the said defendant, William B. Poland, in support of which application said affidavit was filed.”

The Plaintiff further alleges that this fraud deceived the various officers of the Government, including the officials of the Land Department and the President of the United States.

Before taking up the real contention of the Plaintiff, with reference to the quantity of land

acquired by the Defendant Poland under Survey No. 242, we desire to call attention to one apparent misstatement in the affidavit in question which, however, has no real bearing upon the case, and in that connection for the purpose of ready reference we quote in full Section 101, of the Compiled Laws of Alaska, Act of March 3rd, 1903, 32 Stat. at L., p. 1028, which is the Act of May 14, 1898, as amended:

Section 101. "That all the provisions of the homestead laws of the United States not in conflict with the provisions of this act and all rights incident thereto, are hereby extended to the District of Alaska, subject to such regulation as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu land selections pertaining to any grant outside of the District of Alaska shall be made, and no land scrip or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said district except as now provided by law; and provided further that no more than one hundred and sixty acres shall be *entered* in any *single body* by such scrip, lieu selection, or soldier's additional homestead right; provided further that no location of scrip, selection, or right along any navigable or other waters shall be made *within the distance of eighty rods of any lands, along such waters, theretofore located* by means of any such scrip or otherwise; and provided further that no commutation privileges shall be allowed in excess of one hundred and sixty acres included in any homestead entry under the provisions hereof; Provided, That *no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims*; and that nothing herein contained shall be so construed as to authorize

entries to be made or title to be acquired to the shore of any navigable waters within said district; and no patent shall issue hereunder until all the requirements of sections twenty-two hundred and ninety-one, twenty-two hundred and ninety-two, and twenty-three hundred and five of the Revised Statutes of the United States have been fully complied with as to residence, improvements, cultivation, and proof except as to commuted lands as herein provided."

It will be seen that under the provisions of the Statute above quoted an entryman may not enter more than one hundred and sixty acres in a single body, and that no location of scrip, selection, or right, *along navigable or other waters*, shall be made within the distance of eighty rods of any lands *along such waters* theretofore located by means of any such scrip *or otherwise*.

We do not find, however, any provision of the law in said section, nor has our attention been called to any provision of the law anywhere, which prohibits an entryman from taking up land within eighty rods, or any other distance, from any other land theretofore located by him, or any one else, except along navigable waters.

A reference to the plat at once discloses the fact that Survey No. 242 is not along any navigable or other water.

We think, therefore, that we may disregard the immaterial misstatement referred to in the affidavit, to the effect that Survey No. 242 is more than

eighty rods distant from any other Survey, or entry, under the provision of the Act of May 14th, 1898. More particularly is this true, in view of the fact that this affidavit clearly shows upon its face, that it refers to the provisions of the original Act of May 14th, 1898, (30 Stat. L. 409, Vol. 2. Sup. to Rev. Stat. p. 755) and of the fact that the lands sought to be acquired would not extend more than eighty rods along the shore and that the provisions of the Act of May 14th, 1898, to which the affidavit referred and which Act was amended by the Act of May 3rd, 1903, above quoted, made no reference whatsoever to the amount of land which could be included in any single entry. In other words, the maker of the affidavit, and the Defendant Poland, were attempting to comply with the requirements of the Act of May 14th, 1898, with reference to the location of claims along the shore and were not otherwise making reference to the relative location of the claims to each other.

As a matter of fact, when read in connection with the Act of May 14, 1898, to which it refers, the affidavit is entirely accurate, for it is obvious that within the meaning of that act, i. e., along the shore of any navigable or other water, Survey No. 242 is not within eighty rods of any other entry.

The statement in the affidavit that the lands comprised in Survey No. 242, were more than eighty rods distant from any other survey, or entry, is

wholly immaterial upon the question of whether or not these two surveys constitute one entry within the prohibition of Section 101.

If these two surveys do not constitute a single entry, the statement is wholly immaterial. If, on the other hand, they do constitute a single entry the statement is absurd on the face of the survey and description and plats. The language of the affidavit is not that the land sought by entry, under Survey No. 242, is not in excess of 160 acres, *including* the prior entry under Survey No. 241. It is, that the survey in question, No. 242, does not exceed 160 acres, which statement is true.

Of course the Respondent realizes that the Appellant may contend that notwithstanding the apparent purpose of the affidavit, and the reference to the Act in pursuance of a compliance with which it was made, yet the statement that Claim No. 242 is more than 80 rods distant from any other survey, or entry, under the provisions of said Act, might lend color to the impression in the minds of the Government officials, that Claim No. 242 could not be a part of another entry in any event, because it was at least 80 rods distant from any other claim.

It is hard to conceive of such an idea in the mind of any Government official, when we take into consideration the following language, contained in the patent itself, which reads as follows:

“Beginning at Corner No. 1 near the North shore of Resurrection Bay” (*which is not on the shore*) “identical with Corner No. 5 U. S. Survey No. 241.”

This is the language contained in the introductory clause to the patent, which is now sought to be annulled, and which is set forth as Exhibit “B” to the complaint herein.

In other words, this patent shows upon its face, and the survey upon which it was based, showed upon its face, that these two locations—these two claims—were identical in a common corner, and the descriptions show upon their face, that they abut each other on a line drawn East and West.

To say that the Defendant Poland, under such circumstances, deceived the Government officials is to accuse them of a lack of ordinary intelligence, which seems to us impossible for a moment to entertain.

In fact we do not believe that the Plaintiff will seriously contend that the officers of the Land Department were not fully aware of all of the facts in this case. We rather think that the contention will be that the Defendant Poland induced the officers of the Land Department to believe that the two claims, although they adjoined each other, as shown by the Government records, the surveys, plats, notes, etc., did not, as a matter of law, constitute a single body. In other words, it may be contended that he induced the officers of the Land Department to wrongly construe the language of the statute.

We think that if such is the contention, several conclusive answers are available. First, that the construction which they placed upon the statute was correct; and second, that the plaintiff is without any relief for such misconstruction of the law by its officers after the proceedings had passed to patent, and that the complaint is further fatally defective for want of any offer to return to the entryman the consideration which he paid for the land, and that this action cannot be maintained against the Defendant Low.

As to the first, it should be borne in mind that these two transactions were separate and distinct, as to application, surveys and proceedings, and that the patent as to claim under Survey No. 241 was issued on the 20th day of January, 1908, and as to the claim under Survey No. 242 was issued on the 22nd day of March, 1909.

Under such a state of facts the Defendant Poland, on the 20th day of January, 1908, became the owner, under patent from the United States, of the lands comprising Survey No. 241, the title to which has never been questioned. It surely will not be argued that at that time Survey No. 241 comprised, with Survey No. 242, a single parcel of land, because the ownership in one rested in the Defendant Poland, and in the other in the United States.

Manifestly then, if the Defendant Poland entered more than 160 acres in a single body, he did so

when he entered the other parcel, to-wit, Survey No. 242, a long time subsequently. And yet the same process of reasoning prohibits this conclusion, for he could not enter, at a later time, what he had previously entered, so as to relate the two into a single entry, or so as to make two entries of single bodies, into one entry of a single body.

A reading of the Act of March 3rd, 1903, without any attempt to distort the plain language thereof, it seems to us, must lead to the conclusion that what is meant by the words, "shall be entered in a single body" can mean only, shall be entered in one entry, at one time, by one person. Any other interpretation of the language, it seems to us, is simply and plainly a distortion thereof.

The Act does not provide, nor is there any reason which we think can be suggested, why it should have been meant to provide, that one individual could not acquire, by separate entries, more than 160 acres, whether the same adjoined other lands acquired by such individual, or by others.

The analogy which has been drawn by the Trial Judge between the case at bar and the cases arising under the Mining Laws of the United States, it seems to us, is clear, and is urged at this time without taking up the time of the Court in the repetition thereof. We refer to that part of the opinion which is set forth on page 29 of the Transcript herein.

We have assumed thus far that the real con-

tention of the Appellant will be to the effect that the officers of the Land Department in reality made a mistake of law. If, however, it is contended that the mistake is one of fact as to whether or not Survey No. 241 and Survey No. 242 constituted a single body of land, then it is apparent that the elements necessary, in order to invoke the jurisdiction of a court of equity, in two main requirements are wanting in this case. There is wanting an intention on the part of Poland to defraud, because as we have shown, the affidavit in question bears upon its face the evidence of the purpose for which it was drawn, and the act to which it referred, to-wit, the Act of 1898, which fixed no limit upon the amount of land to be entered, except such as was along navigable waters.

It is further wanting in any reliance upon such representation by the officers of the Government, because they must have been just as well acquainted with such a fact, as is in question here, as was the Defendant Poland. The fact in question could only be determined by a survey. It *was* fully and absolutely determined by a survey, and the survey was made under the direction of the Superior Officers of the Land Office, and the record thereof came to their hands before any of Poland's rights had accrued.

It seems to us unnecessary to cite authorities in support of the proposition that, where the officers of the Land Department have passed upon a ques-

tion of fact, and *have been informed* of the facts, that no question of representation by a claimant under the land laws will upset their decision thereon.

We cite, however, a recent case of

U. S. vs. Primrose Coal Co., 216 Fed. p. 553
at p. 557, and cases then cited;

and the case of

Burke vs. So. Pacific Railway Co., 234 U. S.
p. 690; 58 L. Ed. p. 1527,

wherein Mr. Justice Van de Vanter for the Court, at page 1548 quotes with approval from the decision in the case of

Knight vs. United Land Association, 142 U.
S. p. 161 at p. 178; 35 L. Ed. 974 at page
980.

Mr. Justice Van de Vanter, in the case of *Burke vs. So. Pacific Railway Company*, at page 1550, quotes further in illustrating the methods and proceedings of the Land Office, in support of the care which is exercised by the officers of the Land Department, in order to advise themselves as to the actual facts relating to the applications which come before them.

This case is particularly illuminating, if the plaintiff shall attempt to argue that the officers of the Land Department could, under any conceivable state of facts, have been ignorant of the relations of these two surveys to each other.

In the case of

Atlantic Delaine Company vs. James, 94 U. S.
p. 207; 24 L. Ed. p. 112 at p. 114,

Mr. Justice Strong uses the following language:

“Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them.”

This case was quoted in the case of

U. S. vs. Maxwell Land Grant Company, 121
U. S. p. 325; 30 L. Ed. 949,

and on page 959 Mr. Justice Miller uses the following language:

“We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the Government of the United States under its official seal.”

In the case of

U. S. vs. Barber Lumber Co., 194 Fed. page
24 at p. 36,

the U. S. Circuit Court of Appeals for the Ninth Circuit quotes from the *Maxwell Land Grant* case and reiterates the decision quoted.

The Appellees are so confident of the correctness of the position heretofore taken in their brief, that they deem it unnecessary to enter extensively into a further argument with respect to the insufficiency of the complaint as against the Defendant Low. But the allegations of the complaint in this case set forth the transfer from Poland to Low, in paragraph eight thereof, page 11 of the Transcript, in language which must be conceded to admit that Low was a purchaser for value of the premises in question, subsequent to the issuance of the patent. The language is, that the Defendant Poland "conveyed, bargained, sold and confirmed * * * to the Defendant Low and to his heirs and assigns the lands in question," with a covenant of general warranty.

There is no allegation in the complaint that the Defendant Low had any knowledge whatsoever of the alleged defects in the title, or of the facts set forth in the complaint.

In the case of

U. S. vs. Detroit Timber & Lumber Co., 200
U. S. 319; 50 L. Ed. p. 499,

the Supreme Court of the United States holds that a purchaser from an entryman is not charged with knowledge of the wrongful character of the acts of the entryman and quotes with approval from the case of

Wilson vs. Wall, 6 Wallace 83; 18 L. Ed. 727,
730.

“A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge. On this point we need only refer to *Sugden on Vendors*, p. 622, where he says: ‘In *Ware vs. Egmont*, 4 DeG. M. & G. 460, the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired it, but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might, by prudent caution, have obtained the knowledge in question, but whether not obtaining it was an act of gross or culpable negligence.’”

It is respectfully submitted that the decision of the Lower Court should be affirmed.

Respectfully submitted,

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